BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALISCHA N.M. KRAMER	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,041,131
	)	
KANSAS REHABILITATION HOSPITAL	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the September 23, 2008, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. John J. Bryan, of Topeka, Kansas, appeared for claimant. Gary R. Terrill, of Overland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of her employment with respondent and ordered respondent to pay claimant temporary total disability benefits from April 1, 2008, through July 29, 2008, and to reimburse claimant the amount of $465.26 as unauthorized medical.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 17, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant sustained a compensable injury. Respondent argues that the facts and evidence do not support a finding that claimant was injured while in the course and scope of her employment.

Claimant requests that the Board affirm the Order of the ALJ. She asserts that she satisfied her burden of proof that her accidental injuries arose out of and in the course of her employment.

The issue for the Board's review is: Did claimant suffer an accidental injury or injuries that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

In March 2008, claimant was working part-time as a rehabilitation nursing technician at respondent. She lifted people at work on a regular basis. She worked one night a week--from Monday nights to Tuesday mornings. Claimant testified that on the morning of Tuesday, March 11, while attempting to get a heavy male patient out of bed, claimant felt a pain in her back like a pulled muscle. She felt a burning in her low back down her right leg to her toes. The pain lasted about an hour, and then it started to subside and she completed her shift. On Monday, March 17, claimant returned to work. The next morning, March 18, there was a second incident. She again felt the same pain while attempting to get a patient out of bed. Claimant said that this time it took longer before the pain began to subside.

Claimant said she reported the injuries to her supervisor, James Steinmetz, on March 18. Mr. Steinmetz told her to fill out an accident report and to make a copy of it for her records. Claimant did as she was told, placing her copy of the report in her locker. She placed the original report in a box outside the office of Jennifer Passow, the staffing coordinator for respondent. An affidavit from James Steinmetz was introduced at the preliminary hearing. The affidavit reads that on or about March 10, 2008, claimant told him she had hurt her back lifting a patient, and Mr. Steinmetz told her to fill out an accident report and make a copy of it for her records.

Claimant stated that after the second incident of pain at work on March 18, she gradually got worse. She worked again on March 24 and was able to complete her shift with no particular problem. However, on March 31 she called in to work because her back was hurting and she did not think she would be able to do her work. As she was attempting to dress to get ready for work on April 7, her back went out and she fell to the floor. She called her mother for help, and her mother called respondent to let them know that claimant would not be at work.

Claimant had seen Dr. Marc Tennant, a chiropractor, on September 28, 2007, complaining of low back symptoms that were achy, sharp and stiff after lifting her baby. She rated her pain as a 5 on a pain scale of 0 to 10. Dr. Tennant diagnosed her with lumbalgia with lumbar somatic dysfunction. Claimant testified that notwithstanding Dr. Tennant's medical records, she saw him in September 2007 about her hips, not her low back. On March 14, 2008, claimant again saw Dr. Tennant. She was complaining of the same low back symptoms as in September 2007, and she again rated her pain as a 5 on a scale of 0 to 10. Dr. Tennant again diagnosed her with lumbalgia with lumbar somatic dysfunction. There is no mention of a work-related injury in Dr. Tennant's notes of March 14, 2008. Claimant said Dr. Tennant did not ask her about how she injured her back and she did not say anything about pulling her back at work.

Claimant returned to Dr. Tennant on March 24, 2008. She continued to complain of the same low back symptoms but said her pain had decreased to a 4 on a scale of 0 to

10. Dr. Tennant's records show that she appeared to be 30 percent improved. Claimant does not remember telling him about injuring herself at work, and the records do not mention a work-related injury.

After her fall on April 7, claimant went to see her personal physician, Dr. Betsy Johns. Dr. Johns told her to take Tylenol and call back if the pain did not get better by the end of the week. Claimant attributes the problems she had on April 7 to pulling her back at work, but this history is absent from the medical records. When claimant returned to see Dr. Johns, she was referred to Dr. Kenneth Gimple, an orthopedic surgeon, whom she initially saw on April 23, 2008. Dr. Gimple's note of April 23 states: "[S]he states she was not injured at work. She is not aware of injury to her back."[1] Claimant, however, testified that she told Dr. Gimple that she had pulled her back at work and that it again went out when she was taking off her pajama top at home. Claimant admits that when she filled out the patient information sheet, she answered "no" to the question of whether her symptoms were accident related. She testified that she was not sure at that time that her injury was related to her work.

Claimant had an MRI on April 23 that showed she had a herniated disc in her low back. Dr. Gimple told her the pain would not go away without surgery, and claimant opted to have the surgery. When claimant and her mother discussed the surgery with Dr. Gimple's scheduler, they asked what would happen if claimant tried to have the surgery done under workers compensation, and the scheduler told her the surgery would be cancelled until the claim was investigated and that it could take up to a year before the investigation was complete. Because claimant had health insurance, she went ahead and had the surgery on May 12, 2008. She was released from treatment by Dr. Gimple on September 10, 2008.

Claimant testified that she did not know that she was supposed to request medical treatment from respondent after being injured on March 11 and just went to her personal physician. She read respondent's employee handbook but did not remember if the handbook discussed work-related injuries. She stated that other than discussing her back complaints with Mr. Steinmetz on March 11 and 18, she did not make any complaints to her supervisor about her back.

Julie Spring, an employee of respondent, testified that she made out a written statement on July 21, 2008, at the request of her supervisor. Ms. Spring's statement indicated that claimant told her on March 10, 2008, at the beginning of her shift, that she might not be able to help get patients up the next morning because her back was hurt. Ms. Springer said she remembered that claimant made the statement on March 10 because claimant was going from full time to a prn level one or three, which meant she would have been working fewer hours. Ms. Spring said that claimant never said anything to her about

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[1] P.H. Trans., Cl. Ex. 3 at 13.

hurting her back the next morning while assisting a patient. However, on redirect examination, claimant testified that she went from full time to level one prn in October 2007. Once she went to level one prn in October 2007, her status did not change.

Jennifer Passow is the staffing coordinator for respondent. She testified that she never received the written claim form claimant said had been placed in the box outside her office. Ms. Passow also testified that she received a call from claimant asking to be taken off her shift because of a back injury. She did not remember the exact day of this telephone call but thought it was within the first two weeks of March 2008. Ms. Passow said she specifically asked claimant if the injury was work-related, and claimant said that she had injured herself at home. Ms. Passow said she documented the conversation on her staffing sheet. The staffing sheet was not made a part of the record.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[5] The test is not

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[2] K.S.A. 2007 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

[5] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[6] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[7]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS

Respondent maintains that "[i]t is inconceivable how Judge Avery could have considered all of the evidence produced at the Preliminary Hearing and arrive [*sic*] at the conclusion that this claim is compensable."[10] This Board Member disagrees. The ALJ obviously found claimant's testimony credible. And claimant's testimony that she injured her back at work on March 11 and March 18, 2008, is partially supported by the affidavit of James Steinmetz. Mr. Steinmetz agrees that claimant reported having injured her back at work lifting a patient and that he instructed her to complete an accident report. However, Mr. Steinmetz' affidavit mentions only one such incident, and it references a different date. Nevertheless, respondent is correct that the greater weight of the evidence is contrary to a finding of compensability. Claimant has been less than clear and consistent about the

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[6] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[7] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2007 Supp. 44-555c(k).

[10] Respondent's Brief at 3 (filed Oct. 31, 2008).

dates of her accidents. Furthermore, none of the medical records support claimant's claim of a work-related injury. Moreover, claimant admits to a worsening occurring away from work, at home, which respondent argues constituted an intervening injury which relieves them of liability for the alleged work-related accidents. And, when claimant was seen by a chiropractor approximately six months before the alleged accidents, she had substantially the same symptoms and complaints as what she presented with at her March 14, 2008, appointment with Dr. Tenant. Finally, the testimony of Ms. Spring and Ms. Passow contradict claimant's testimony in significant parts. However, both of them had very questionable recollections of dates.

Claimant correctly points out that an aggravation of a preexisting condition is compensable. But when claimant returned to her chiropractor shortly after her alleged injuries at work, she made no mention of any new accidents, injuries or work-related aggravations. Claimant's symptoms when she saw Dr. Tennant on March 14 and 24, 2008, were virtually identical to what she had when she saw him on September 28, 2007. Claimant never asked respondent to provide her with a physician. Instead, she sought medical treatment on her own, first with Dr. Tennant, then Dr. Johns, and ultimately with an orthopedic surgeon, Dr. Gimple. None of these physicians have a history of a work-related accident or injury. To the contrary, Dr. Gimple's records reflect that claimant denied her injury resulted from an accident. The forms claimant completed for Dr. Gimple provided her with several opportunities to mention her accidents at work, but she left those questions blank. Claimant tried to explain these omissions as resulting from her being uncertain about the cause of her back problems. In light of this, claimant's assertion that she verbally told Dr. Gimple that she hurt her back at work is not credible.

The most damaging evidence in this evidentiary record is that despite claimant having sought treatment with several different health care providers after she had already allegedly reported a work-related accident and injury to her supervisor, there is never a mention of such an accident or accidents in their records. Claimant is young and perhaps unaware of the importance of giving the doctors a complete and accurate history for purposes of workers compensation. But as someone who is trained and works in the health care profession, this would seem to be something she would understand just as a matter of obtaining appropriate treatment irrespective of her workers compensation claim.

There remains the matter of the affidavit from Mr. Steinmetz. This is strong evidence in support of claimant having reported that she injured her back at work and that such an accident did occur. However, Mr. Steinmetz did not testify, and his affidavit was not tested by cross-examination. Standing alone, and in the absence of Mr. Steinmetz' testimony, this affidavit does not overcome the contrary evidence. Furthermore, it does not explain the numerous inconsistencies in claimant's testimony. In particular, it does not explain why, if claimant had already reported a work-related accident and completed an accident report, she would not mention that accident to her physicians or why she would be confused about whether her injury was work related.

The ALJ found that claimant suffered "an accidental injury."[11] Thus, it appears he only found a single accident. The ALJ's Order did not specify when that accident occurred, whether it was on March 10, 11, 17, or 18. The claimant's Application for Hearing[12] alleged a single date of accident on March 10, 2008. This is likewise the date referred to by Mr. Steinmetz in his affidavit. It is probable that the ALJ found an accident date of March 11, 2008, because Judge Avery announced at the outset of the preliminary hearing that "this was an alleged 3/11/08 accident."[13] However, claimant's preliminary hearing testimony suggests there were at least two accidents at work and these most likely occurred on March 11 and March 18. In her brief to the Board, claimant again argues for a single date of accident of March 10 or March 11, 2008. The difference between March 10 and March 11 is not significant because both dates represent a single shift at work which started on March 10 and ended on March 11. The real questions are whether there was an accident on that shift, whether there was another accident or aggravation during the shift on March 17 and 18, and whether the subsequent incident at home constituted an intervening injury. There is also the possibility that this is all a natural consequence of claimant's preexisting condition.

Claimant's position on the date of accident question is summarized in her brief to the Board as follows:

> Respondent alleges that the evidence is conflicting as to the date that the claimant is alleging injury, and as to how many injuries are being claimed. As shown by the preliminary hearing testimony, the Claimant went to work 3/10/08 and later in her shift (early on 3/11/08) injured her back "attempting to get a heavy male patient out of his bed for the morning to get him dressed." While lifting/pulling, she felt something pull in her back. [Citation omitted.] Regarding that incident, she testified: "It felt like a muscle had pulled, and I had burning in my lower back and down through my legs." [Citation omitted.] She finished her shift. She returned to work the next Monday, March 17th. She suffered a similar pain upon getting a patient out of bed. Of that incident, Claimant testified: "It was the same kind of pain except this time it didn't subside as quickly." [Citation omitted.] Since this incident was nearly identical to the March 10th occurrence, and since Claimant suffered the "same kind of pain," this is shown to be a natural and probable consequence.[14]

Claimant further argues that the incident at home on April 7, 2008, was a natural consequence of the work-related injury or injuries. That may be so, but there is no medical

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[11] ALJ Order (Sept. 23, 2008).

[12] Form E-1, Application for Hearing, filed July 17, 2008.

[13] P.H. Trans. at 6.

[14] Claimant's Brief at 3 (Nov. 10, 2008). See also P.H. Trans. at 20.

testimony or opinion that supports this theory. Likewise, there is no medical opinion on the question of whether this is all a natural consequence of claimant's preexisting condition. It is respondent's burden to prove an intervening accident and injury, and such has not been proven. But given the questions raised about claimant's testimony, this Board Member is not persuaded that claimant has met her burden of proving that she suffered personal injury by accident arising out of and in the course of her employment with respondent.

CONCLUSION

Based on the record presented to date, claimant has failed to prove that her temporary total disability and need for medical treatment was due to a personal injury suffered in an accident or accidents at work.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 23, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Gary R. Terrill, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge